IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In his brief opposing the award of certiorari herein, Lowry does not dispute Petitioners' assertion (Pet. 12) that the Fourth Circuit's decision conflicts with the purposes, spirit and language of the Labor Manage-

ment Relations Act, 1947, and decisions of this Court, the Sixth Circuit and even the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427.

Instead, Lowry's complaint (Br. 6) is that Petitioners seek to "circumvent the requirement of the Federal judicial system of finality as a condition of review". Not only does Lowry misconceive this Court's rule of review, but his complaint ignores *U.S.* v. *General Motors Corp.*, 323 U.S. 373 [cited in the Petition for Certiorari (p. 12)], as well as *Land* v. *Dollar*, 330 U.S. 731, wherein a Federal court of appeals had reversed a district court's dismissal of an injunction complaint with prejudice and had remanded the case, and wherein this Court observed that (330 U.S. 734, fn. 2):

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case' ",

citing the *General Motors* case.

It is significant that whereas the district court found "there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", the Fourth Circuit's majority does not profess there was error in the district court's finding, nor does it show the existence of a genuine issue of fact necessary if summary judgment is to be denied.

While the Fourth Circuit's majority remanded the case solely because "we think the factual situation should be more fully developed" (App. 3a),[1] it is further significant that Lowry did not contend either in the district court or in the Fourth Circuit, nor does

[1] This reference is to the Appendix to the Petition for Certiorari.

he contend in his opposition brief, that he has any additional facts to present upon remand that were not presented to the district court upon the motion for summary judgment.

If the Fourth Circuit's decision is permitted to stand and the case is retried upon remand, as the Fourth Circuit has directed, the district court will necessarily be under a compulsion to follow the legal principle expressed in the majority opinion. The admission of defendant's testimony dealing with his "sham contract" defense[2] would be over Petitioners' objection and would again invoke and involve Petitioners' contention that national labor policy forecloses the right of an operator signatory to an industry-wide collective bargaining agreement, containing an irrevocable trust for benefit of employees, from varying its terms and evading his obligation to the trust fund on the ground that the written agreement was a "sham" or pretensive agreement. Petitioners' motion for directed verdict would likewise involve the same inquiry.

In the event of a judgment adverse to Petitioners, the appeal to the Fourth Circuit would necessarily be an abortive one because of the majority's decision in the present case and a second petition for review to this Court would then involve the precise question now presented. Certainly, as this Court recognized in the *General Motors* and *Land* cases, the instant case involves an issue "fundamental to the further conduct of the case."

Even if the remand proceedings resulted in a judgment favorabl to Petitioners, the legal principle enun-

[2] Such defense would necessarily have to be consistent with Lowry's affidavit and depositions upon which the district court granted summary judgment.

ciated in the majority's opinion would remain undisturbed, the existing conflict between the majority's views and the decisions of this Court, the Sixth Circuit and the Fourth Circuit's *Mearns* case would remain unsettled, and the confusion in the Fourth Circuit because of the variant views expressed in the instant case by the Fourth Circuit and those approved by it in the *Mearns* case would continue, despite the fact, as Judge Sobeloff's dissent shows, the question now presented to the Court is a recurring one and is vital, not only in the administration of the collective bargaining agreement now before the Court, but in the processing of all labor agreements.

Cases cited by Lowry (Br. 7, 8) are inapposite. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123, 124, recognizes that there are rulings which warrant "a departure from this requirement of finality for Federal appellate jurisdiction". Moreover, *Johnson* concerned the review of a state court decision, and this Court carefully observed that Congress limited this Court's "power to intervene in State litigation only after 'the highest court of a State . . .' has rendered a 'final judgment or decree'" (326 U.S. 124). No such statutory limitation is applicable herein.

Nor is *Cobbledick* v. *U.S.*, 309 U.S. 323, 324-6, applicable, for therein this Court dealt, not with its power to review non-final judgments, but with the right of a Federal court of appeals to review, under the judicial code, a district court's order denying a motion to quash a subpoena duces tecum.[3]

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[3] In *Cobbledick*, the Court said (309 U.S. 324): "The question is whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review by § 128(a) of the Judicial Code (28 USCA § 225)."

Similarly without merit is Lowry's final argument that Petitioners should have sought review in this Court of *Lewis* v. *Mears,* DC Pa., 189 F. Supp. 503, aff'd 3 Cir., — F. 2d —, October 11, 1961 (cited in the Petition for Certiorari, p. 10). Petitioners' rehearing petition is still pending. Moreover the existence of the *Mears* case does not serve as a reason for this Court's denial of the instant petition; instead it emphasizes the necessity for this Court's granting the petition as a guide for the Third Circuit in the *Mears* case.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, Petitioners submit that the Writ as prayed for should issue.

Respectfully submitted.

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907 Fifteenth Street, N. W.,
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